No. 7740

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRY THOMPSON, JOHN MARS, and DOUGLAS PARKER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Montana

LOUIS P. DONOVAN,
Attorney for Appellants,
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STATEMENT OF THE CASE

This action was brought by the United States to recover the penalty specified in a bond given pursuant to the provisions of Section 22, Title 2 of the National Prohibition Act (27 USCA, Sec. 37; R. 2-5). Judgment was entered for the United States against appellants for the amount of the bond and interest thereon (R. 24-25). The appeal is from the judgment so rendered.

The Complaint alleges that on May 12, 1930 Decree was entered in the court below in an equity case therein pending against the defendant, Harry Thompson, and one Ted Verburg, enjoining the maintenance of a liquor nuisance in the Thompson Hotel at Sweet Grass, Montana, and the use or occupation of the said premises for a period of one year thereafter (R. 2-3), but providing, however, that the said prem-

ises might remain open during the said period if the defendant, Harry Thompson, should give a bond in the sum of $1,000.00 conditioned as provided in said decree. It is further alleged that the bond, which is the basis of this suit, was given May 31, 1930 pursuant to said decree (R. 3-4). The condition of the bond and the alleged breach thereof are pleaded as follows:

> "That the conditions of said bond are, if said premises shall be used and occupied during said period of one year and if no intoxicating liquor is, during said period, manufactured, sold, bartered, kept or otherwise disposed of therein or thereon, and if the said principal and sureties will pay all fines, costs, and damages that may be assessed for any violation of the National Prohibition Act upon said property, then said obligation shall be null and void, otherwise to remain in full force and effect.
>
> 3. That said defendants have wholly failed to perform the conditions of said bond in that on or about the 16th day of April, 1931, one Everett Knouse, did, upon said premises hereinbefore described, then and there wilfully, wrongfully and unlawfully have and possess intoxicating liquor, to-wit, beer, whiskey and wine for beverage purposes, and without a permit so to do."
>
> (R. 4.)

The appellants, John Mars and Douglas Parker, filed separate general demurrers to the Complaint (R. 8, 10). These Demurrers were overruled by the trial court (R. 10, 12), and thereafter Mars and Parker answered the Complaint, denying that the bond had been executed by the defendant, Harry Thompson (R. 14-15), and denying that the condition of the bond had been breached (R. 14). The appellant, Harry Thompson, one of the defendants in the court below,

was not served with summons (R. 7) and did not appear or plead in the action.

Upon the trial of the action, before the court sitting with a jury, the defendants objected to the introduction of any evidence on the part of the plaintiff upon the ground of the insufficiency of the Complaint in the following respects:

> "That it does not allege that the principal named in the bond, or the sureties thereon, have failed to pay any fine, costs or damages assessed for any violation of the National Prohibition Act by reason of unlawful acts committed on said property.
>
> 3. The complaint does not allege or show that any intoxicating liquor, during the term of said bond, was manufactured, sold, bartered, kept or otherwise disposed of therein or thereon or thereunder, and thereby the Complaint fails to show any breach of the condition of the bond.
>
> 4. That if the Complaint ever stated a cause of action the same was, and is, one to recover a penalty under the National Prohibition Act, and such cause of action failed and ceased to exist on the repeal of the Eighteenth Amendment to the Constitution of the United States in December, 1933.
>
> 5. That there is no allegations in the Complaint sufficient to show that the alleged acts of *possession* was a *continuance* or a renewal of the alleged nuisance which was abated by the judgment of abatement in question and involved in that suit, and therefore such act of *possession* was not a breach of the condition of the bond in question." (R. 28-29.)

(NOTE: In the record the word "malice" appears instead of the italicised word "possession" and the word "condition" appears instead of the italicised word "continuance". These are typographical errors.)

The objection was overruled by the court and exception taken (R. 29).

Counsel for the Government thereupon introduced in evidence the Judgment Roll in the abatement suit (R. 29-42). This Judgment Roll showed that the defendant, Harry Thompson, was not served with process in that suit (R. 37), and did not appear therein (R. 29-42). The writ of injunction issued in the abatement suit was introduced in evidence (R. 43-45) over the objection of the defendants that the court had no jurisdiction over the defendant, Harry Thompson (R. 42). The bond sued on was introduced in evidence (R. 47-49).

Thereupon counsel for the Government offered and introduced in evidence over the objection of the defendants the Judgment Roll in a criminal action against one Everett Knaus showing that the said Everett Knaus was charged and convicted of a violation of the National Prohibition Act alleged to have been committed on or about the 16th day of April, 1931 "at and within those certain premises known as the Thompson Hotel in the Town of Sweet Grass, in the County of Toole, in the State and District of Montana" (R. 50-57). The defendants objected to the introduction of this Judgment Roll and papers therein contained "on the ground that they are irrelevant and immaterial, and the defendants in this action are not parties to said judgment. The same is not in any manner binding on either one of them or against them" (R. 50). The objection was overruled and exception taken (R. 50). No other evidence of any character was offered in support of the allegation that the condition of the bond had been breached.

Another Judgment Roll was introduced in evidence over the objection of appellants (R. 58), but it related to a transaction occurring prior to the date that the bond herein was given and none of the parties to this suit were parties to that action (R. 59-63).

The Government having rested, the defendant, Harry Thompson, moved for a judgment of non-suit upon the following grounds:

"1. That the Complaint herein does not state facts sufficient to constitute a cause of action.

2. That the evidence introduced herein does not prove a breach of the continuance (condition) of the bond.

3. The evidence introduced herein is wholly insufficient to show that the principal or sureties, named in the bond, failed to pay any or all fines, costs or damages assessed for any violation of the National Prohibition Act upon said property. The evidence is insufficient in that it fails to show there was any act committed on the property which revived the nuisance abated by the judgment in the abatement suit, or constituted a continuation of that nuisance.

On the further ground, this action is one to recover a penalty under the National Prohibition Act and that the repeal of the National Prohibition Act in December of last year, upon repeal of the Eighteenth Amendment to the Constitution, abated the action and destroyed all right of action, if any theretofore existing."

(R. 64-65.)

The defendants, Mars and Parker, moved for a judgment of non-suit upon the grounds specified in the motion for non-suit of Harry Thompson (R. 65). The motions for non-suit were denied and exceptions taken (R. 65). The defendants introduced no evidence

and thereupon the court, on motion of counsel for the Government, directed the jury to return a verdict for the plaintiff (R. 65-66), and defendants excepted thereto (R. 66).

Pursuant to the Court's instruction, the jury returned a verdict "in favor of the plaintiff and against the defendants in the sum of One Thousand Dollars" (R. 23). Judgment was entered thereon for recovery of "the sum of One Thousand ($1000) Dollars, together with interest thereon amounting to $209.97" and costs (R. 25).

Specifications of Error

The defendants make the following Specifications of Error as contained in their Assignments of Error filed in the trial court (R. 69-72).

(1) That the court erred in overruling the separate demurrers of the defendants, John Mars and Douglas Parker, to the Complaint in this action (R. 10-12);

(2) The court erred in overruling the objection made by defendants at the opening of the trial objecting to the introduction of evidence (R. 27-29);

(3) The Court erred in overruling defendants' objection to the introduction in evidence of the Judgment Roll in the case of United States of America against Everett Knaus filed May 8, 1931 (R. 50);

Said Judgment Roll consisted of an Information filed in the trial court April 27, 1931 against one Everett Knaus, and in the first count thereof it was charged that on April 16, 1931, said Everett Knaus "at and within those certain premises known as the Thompson Hotel in the Town of Sweet Grass, in the

County of Toole and State of Montana * * * did then and there wrongfully and unlawfully have and possess intoxicating liquor, to-wit: whiskey, wine and beer" (quantity unknown), and that he had been previously convicted. In the second count of said Information, it was charged that on the 16th day of April, 1931, said Everett Knaus "at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place where intoxicating liquor was possessed and kept in violation of title 2 of the National Prohibition Act", etc. Said Judgment Roll further showed that the parties waived jury trial, and tried said cause to the Court without a jury, and that on May 8, 1931 a Judgment was rendered in said cause by the Court finding said defendant, Everett Knaus, guilty as charged and imposed upon him a penalty of fine and imprisonment (R. 51-57);

(4) The Court erred in denying the Motion of the defendant, Harry Thompson, for a judgment of non-suit (R. 64-65);

(5) The Court erred in denying the Motion of the defendants, Mars and Parker, for a judgment of non-suit (R. 65);

(6) The Court erred in instructing or advising the jury to return a verdict for the plaintiff (R. 65-66);

(7) The Court erred in entering a judgment herein for $1,000.00 and interest thereon in the further sum of $209.97 upon a verdict for recovery of $1,000.-

00 only without any provision for interest thereon (R. 23-25);

(8) The defendant, Harry Thompson, separately assigns as error the decision of the court directing a verdict against him, the said Harry Thompson (R. 66);

(9) The defendant, Harry Thompson, separately assigns as error the entering of a judgment against him, the said defendant, Harry Thompson (R. 25).

Questions Involved

The appeal involves the following questions:

(1) Is the allegation of the Complaint to the effect that a third party, one Everett Knaus, possessed intoxicating liquor upon the premises sufficient to show a violation of the condition of the bond?

(2) In order to sustain a right of recovery upon the bond, is it not necessary to allege and prove a failure on the part of the principal in the bond, or someone for whose acts he is responsible, to pay fines, costs or damages assessed for violation of the National Prohibition Act?

(3) If the bond can be deemed to provide a penalty instead of merely assurance for the payment of costs, fines and damages, was not the right of action abated with the repeal of the Eighteenth Amendment to the Constitution?

(4) Does a judgment against a third party (one Everett Knaus in this case) prove a breach of the conditions of the bond as against the defendants herein?

(5) Can the Court, upon a verdict for recovery of $1,000.00, without interest, enter a judgment for

$1,000.00 *and interest in the additional sum of $209.97 more?*

(6) Had the Court jurisdiction to direct a verdict and enter a judgment against the appellant, Harry Thompson, in view of the fact that he had not been served with process nor appeared in the action?

ARGUMENT

I.

IS THE ALLEGATION OF THE COMPLAINT TO THE EFFECT THAT A THIRD PARTY, one Everett Knaus, POSSESSED INTOXICATING LIQUOR UPON THE PREMISES SUFFICIENT TO SHOW A VIOLATION OF THE CONDITION OF THE BOND?

The sufficiency of the Complaint to state a cause of action was raised by Demurrer (Specification [1]), objection to the introduction of evidence (Specification [2]), and motions for non-suit (Specifications [4] and [5]).

The statute which allowed the reopening of the premises notwithstanding the padlocking injunction, read as follows:

> "But the court may in its discretion permit it to be occupied or used if the owner, lessee, tenant or occupant thereof shall give a bond with sufficient surety to be approved by the court making the order, in the penal and liquidated sum of not less than five hundred nor more than one thousand dollars payable to the United States, *and conditioned that intoxicating liquor shall not thereafter be manufactured, sold, bartered, kept or otherwise disposed of therein or thereon,* and that he will pay all fines,

costs and damages that may be assessed for any violation of this chapter upon said property."

27 USCA Sec. 34.

The Complaint does not allege that intoxicating liquor was "manufactured, sold, bartered, kept or otherwise disposed of therein or thereon" (R. 4). It merely alleges "that on or about the 16th day of April, 1931, one Everett Knaus did upon said premises hereinbefore described * * * have and possess intoxicating liquor" (R. 4).

This amounts to nothing more than that a third party—a guest of the hotel or possibly a mere intruder—has entered upon the hotel premises with liquor in his possession. Whether the liquor so possessed by such third party was contained in a flask in his pocket or was concealed in his baggage, or was otherwise possessed by him, is not disclosed in the pleading. But the pleading does not allege a breach of the condition of the bond and therefore fails to state a cause of action, unless it be held that the mere entry of a guest or intruder upon the hotel premises with a flask in his pocket constitutes a breach of the bond for the full penal sum thereof.

The plaintiff is presumed to have stated his case as strongly as the facts will justify.

State v. State Board of Examiners,
74 Mont. 1, 238 Pac. 318;

Alderson v. Republican Courier Co.,
69 Mont. 270, 221 Pac. 544;

Conrad National Bank v. Great Northern R. Co., 24 Mont. 178, 61 Pac. 1.

And when the pleading is susceptible of two mean-

49 CJ 112.

ings, that which is most unfavorable to the pleader must be accepted. This is particularly true where the sufficiency of the pleading is raised by Demurrer.

49 CJ 113.

It will be noted that the statute which prescribes the condition of the bond does not require it to be conditioned that liquor shall not be "possessed" upon the premises (27 USCA Sec. 34). The Complaint does not in any manner purport to show that liquor was "manufactured, sold, bartered * * * or disposed of" upon the premises.

We respectfully submit that an allegation that a third party, wholly unconnected with the premises, did "have and possess intoxicating liquor" upon the premises, is not equivalent to an allegation that liquor was "kept" upon the premises in violation of the condition of the bond.

The word "kept" is the past participle of the word "keep" and, as used in the statute, the present tense of the verb means:

> "to manage, conduct, carry on or attend, as a business; as to keep a store, to keep a hotel".
>
> Funk & Wagnalls New Standard Dictionary.

The word implies some degree of continuity in point of time, and the mere fact that some third party, perhaps a total stranger, was upon the premises and "possessed" liquor, did not show a violation of the condition of the bond. "Kept" and "possessed" are not synonymous terms.

> "The term 'keeping', when used to characterize the keeping of places for the sale of intoxicating liquor in violation of law, 'imports knowledge of the

manner or condition in which it is kept, and a continuing purpose to keep it.' "

Nicholson v. People, 29 Ill. App. 57, 65.

"A fire insurance policy prohibiting the 'keeping and storing' on the premises of articles denominated 'Hazardous' was not violated by such articles being temporarily on the premises, but they must be there for the purpose of being stored or kept before the company could be exempted from liability."

Hynds v. Schenectady Co. Mut. Ins. Co., 11 NY 554, 561.

"The words 'keep and have' in a policy of fire insurance forbidding the insured to 'keep or have' benzine on the premises, were intended to prevent the permanent and habitual storage of the prohibited articles on the premises and the taking of benzine upon the premises for temporary purposes is not prohibited by this clause of the policy."

Mears v. Humbolt Ins. Co., 92 Pac. 15, 19, 37 Am. Rep. 647;

Krug v. German Fire Ins. Co., 23 Atl. 572, (Pa.) 30 Am. St. Rep. 729.

"The word 'kept', as used in an insurance policy providing that it shall be void if certain substances are kept on the premises, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time."

First Congregational Church of Rockland v. Holyoke Mut. Fire Ins. Co., 33 NE 572, 158 Mass. 475, 19 LRA 587, 35 Am. St. Rep. 508.

The presence of five gallons of gasoline upon insured premises

"was not a violation of the clause in the policy insuring the factory that gasoline should not be *kept* or allowed on the premises."

Clute v. Clintonville Mut. Fire Ins. Co., 129 NW 661, 144 Wis. 638, 32 LRA (NS) 240.

Possession on the other hand, may be of an almost momentary character.

> "Possession is actual possession by accused of liquor under his control and domain."
>
> Murphy v. U.S. (CCA Mo.), 18 F. (2d) 509.

Appellants further respectfully urge upon the court the point that the bondsmen are not liable for the act of a third person committed without their knowledge or consent, where such third person is not related to them in any manner as tenant, agent or employee, or otherwise. The contrary construction of the statute would mean that the bondsmen may be subjected to the payment of the full penal sum of the bond without any fault or delinquency on their part, by the unauthorized act of a total stranger—a mere intruder or prospective guest of the hotel entering upon the premises with a liquor flask in his pocket. To avoid such liability, the bondsmen would have to guard the premises and search all persons seeking to enter thereon.

We respectfully submit that the statute does not require or justify such a construction; and that the Complaint herein which merely shows that a third person, an entire stranger to the bondsmen "did have and possess intoxicating liquor" (R. 4) upon the premises, is insufficient to show a breach of the condition of the bond. The Court, therefore, erred in overruling the demurrers to the Complaint, objection to the introduction of evidence and motions for non-suit.

II.

IN ORDER TO SUSTAIN A RIGHT OF RECOVERY UPON THE BOND, IS IT NOT NECESSARY TO ALLEGE AND PROVE A FAILURE

ON THE PART OF THE PRINCIPAL IN THE BOND, OR SOMEONE FOR WHOSE ACTS HE IS RESPONSIBLE, TO PAY FINES, COSTS OR DAMAGES ASSESSED FOR VIOLATION OF THE NATIONAL PROHIBITION ACT?

[Specifications (1), (2), (4), and (5)]

The Complaint is apparently brought upon the theory that the bondsmen are liable for the full penal sum of the bond notwithstanding the fact that there has been no failure "to pay all fines, costs and damages that may be assessed for any violation of the National Prohibition Act" (R. 2-3). Appellants respectfully submit that the condition of the bond to the effect "that he will pay all fines, costs and damages that may be assessed for any violation of this chapter upon said property" (27 USCA Sec. 34), is the measure of liability upon the bond. The identical question was decided in 1931 by the District Court of Montana, Bourquin, District Judge, in the case of United States v. Johnson, 51 F. (2d) 312. The following excerpt from the Opinion of Judge Bourquin in that case sets forth the reason for the rule:

> "In principle, the case cannot be distinguished from United States v. Zerbey, 271 US 332, 46 S. Ct. 532, 534, 70 L. Ed. 973. There was a permit to sell intoxicating liquors, and a bond conditioned not to violate the law, and to pay all fines and penalties imposed by law. Payment was a condition, because the valid practice and regulations themselves and law, so provided; and as always, the law is part of the bond. The Supreme Court held that the provision for such payment and not the penal sum was without doubt intended to be and was 'the measure of the obligation incurred under' the bond. Here,

was a permit to occupy the premises for lawful uses, and a bond conditioned as in the Zerbey Case. And the construction and liability in both cases must be one and the same. In brief, a statutory bond to secure performance of two conditions, viz.: (1) Lawful conduct and (2) payment for any breach, the second but a consequential incident of the first, in the nature of things is in legal effect alternative; that is, obey or pay. The failure to perform one imposes no liability, unless there be failure also to perform the other. Until breach of the first condition, there is no debt owed and payment due, and so no possible breach of the second condition. There is no duty to perform the second until the first is breached, and performance of the second is compensation for the breach. Before there can be resort to the bond, there must have been breach of both conditions, happening of both contingencies. And the extent of the liability is not the penal sum prescribed save as a limitation, but is indemnity or payment according to the condition. That is evidently the intent of this more or less crude and confused statute, to arrive at which and to avoid absurdity, requires that the conjunctive 'and' be, as usual, read the alternative 'or'. And that is the principle of Zerbey's Case, supra, even if but vaguely conceived."

United States v. Johnson, 51 F. (2d) 312.

A contrary conclusion was reached by Judge Netterer in United States v. Orth, 59 F. (2d) 774. Therein, Judge Netterer held that the conditions of the bond are several, and that "the penalty in the bond is not to secure material results, but purely a penalty for the affront to the sovereign". (59 F. [2d] 775. In the course of his Opinion, he said:

"No rule of statutory construction, can harmonize the precisely expressed conditions of the bond in issue with indemnity. The expressed intent of the Congress is to prevent traffic in liquors, to close the

building against liquor traffic, which the padlock does, and which the bond assumes under penalty.

The second condition is likewise specific, and in no general way has relation to the first condition by word or phrase. The conditions are not of the same kind. Nor are the conditions capable of an analogous meaning and by association take color from each other, so that the first condition, penalty, is restricted to a sense of the second, indemnity. The second condition has no operative effect in this case."

United States v. Orth, 59 F. (2d) 774.

Appellants respectfully submit that Judge Bourquin's construction of the statute in United States v. Johnson, supra, above quoted, is the correct one, and that it is in harmony with the decision of the Supreme Court in United States v. Zerbey, 271 US 332, 46 S. Ct. 532, 70 L. Ed. 973.

The writer respectfully suggests that the construction which Judge Netterer gives to the statute and bond in U. S. vs. Orth, supra, has the effect of rendering the bond totally inadequate as an assurance for the payment of "fines, costs and damages", and in effect nullifies the provision of the statute providing that the principal and sureties upon the bond shall be liable for the payment of "fines, costs and damages". If the entire penal sum of the bond becomes payable to the Government as a penalty for any violation of the National Prohibition Act occurring upon the premises, then, in such case, there remains no further liability of principal or sureties which may be applied to the payment of "fines, costs and damages that may be assessed for any violation of this chapter upon said property". A construction which would thus nullify

one of the clauses of the statute should be avoided on ordinary rules of statutory constructions.

59 CJ 995.

Attention is also called to the fact that Judge Netterer's opinion in U. S. v. Orth, supra, makes no mention of the earlier decision of Judge Bourquin in U. S. v. Johnson, supra. Apparently the earlier decision of Judge Bourquin in U. S. v. Johnson, 51 F. (2d) 312, was entirely overlooked by Judge Netterer.

III.

IF THE BOND CAN BE DEEMED TO PROVIDE A PENALTY INSTEAD OF MERELY ASSURANCE FOR THE PAYMENT OF COSTS, FINES AND DAMAGES, WAS NOT THE RIGHT OF ACTION ABATED WITH THE REPEAL OF THE EIGHTEENTH AMENDMENT?

[Specifications (2), (4) and (5)].

If we assume for the purpose of argument that Judge Netterer's interpretation of the statute and bond in United States v. Orth, supra, is correct, the Complaint nevertheless fails to state a cause of action. Judge Netterer's conclusion is based upon the view that the statute and bond provide for the recovery of a *penalty* in the event of violation of the National Prohibition Act. He said:

> "The penalty is specific to be paid on doing the prohibited thing against the sovereign will. * * * * The penalty in the bond is not to secure material results, *but purely a penalty for the affront to the sovereign.*"

59 F. (2d) 775.

"Nor are the conditions capable of an analogous meaning and by association take color from each other, *so that the first condition, penalty,* is restricted to a sense of the second, indemnity".

59 F. (2d) 775.

"* * * * The penalty became absolute when the condition was violated."

59 F. (2d) 776.

But if the action is one to recover a penalty for the affront to the sovereign will, as held by Judge Netterer, then the repeal of the Eighteenth Amendment which in effect repealed the National Prohibition Act, operated to abate the action and terminate the proceedings.

It is universally held that the repeal of a statute under which penalties recoverable have been incurred will operate to take away all rights to the recovery of such penalties.

"The repeal of a statute under which penalties recoverable have been incurred will operate to take away all rights to the recovery of such penalties, either by the public or by individuals, unless such rights are preserved by a saving clause or such suits have been prosecuted to judgment before the repealing act takes effect."

59 CJ 1188, Sec. 726, and cases cited.

Continental Oil Co. v. Montana Concrete Co., 207 Pac. 116, 63 Mont. 223.

"On the repeal of the Eighteenth Amendment all laws dependent on this amendment for the congressional power to enact them became inoperative and all actions pending in the trial court or on appeal were properly dismissed."

U. S. v. Chambers, 54 S. Ct. 434, 78 L. Ed.——

Massey v. U. S., 54 S. Ct. 532, 78 L. Ed.——

"The court takes judicial notice of the repeal of the Eighteenth Amendment."

U. S. v. Chambers, supra.

Appellants respectfully submit that if, in accordance with the view of Judge Netterer in U. S. v. Orth, the Complaint can be deemed to have stated a cause of action when the case was filed in October, 1931, and when the Demurrers were overruled, it nevertheless abated upon the repeal of the Eighteenth Amendment and the Court erred in overruling appellants' objection to the introduction of evidence upon the trial of the action and their several motions for non-suit.

If the bond is deemed to provide a *penalty* instead of merely indemnity for the payment of "costs, fines and damages", then the provisions of the bond and the action authorized thereon are merely methods adopted to implement the National Prohibition Act, and all proceedings thereon necessarily abated when the National Prohibition Act became nullified by the repeal of the Eighteenth Amendment December 5, 1933.

A decree cannot be made and entered after repeal of the Eighteenth Amendment which decrees the forfeiture of vessels for carrying intoxicating liquor contrary to the National Prohibition Act.

The Helen (CCA NJ 1934), 72 F. (2d) 772.

Where accused has been convicted of a violation of the National Prohibition Act prior to the repeal of the Eighteenth Amendment, but execution of the sentence was suspended on probation, he was entitled to a discharge where an appeal was pending from the order revoking his probation and reinstating the sen-

tence at the time of the repeal of the National Prohibition Act.

Cornerz v. U. S. (CCA La. 1934), 69 F. (2d) 965.

The repeal of the Eighteenth Amendment also abated the Government's right to recover "a special excise tax of One Thousand Dollars in the case of every person carrying on the business of a brewer, distiller, wholesaler liquor dealer, retail liquor dealer * * * in any state * * * contrary to the laws of such state"; as such provision was in effect a penalty imposed as part of the enforcing machinery of the Eighteenth Amendment and therefore fell with it. And there could be no conviction for violation of that section after repeal of the Eighteenth Amendment.

Constantine v. U. S. (CCA 5th Cir.), No. 7627, Decided March 15, 1935, 2 US Law Week, Index Page 685.

In the case last cited, the court said:

"We think that the language of the Act, in requiring all kinds of handlers of intoxicating liquors to pay the same amount, instead of, as liquor taxing acts do, making the exaction fit the business done, its history from its first introduction on February 24, 1919, after the passage of the wartime Prohibition Act and the adoption of the Eighteenth Amendment, the judicial construction given to this section and the general Revenue Acts, in relation to the National Prohibition Act in general, and Section 35 of that Act, and Section 5 of the Willis-Campbell Act in particular, the administrative interpretation which has followed these decisions, the Act of March 22, 1933, authorizing the manufacture and sale of beer, and, generally, the failure of Congress to reenact this section since the repeal of the Eighteenth Amendment, put beyond question that its function and purpose was to penalize and prohibit; that it was enacted as a penalty, not a

tax, and that it may not now, with the Amendment which authorized it repealed, be enforced as a penalty."

For the same reason, it has also been held that Subdivision (4) of Section 245, Title 26 USCA, imposing a special tax "on all distilled spirits which are diverted to beverage purposes", etc., became inoperative upon repeal of the Eighteenth Amendment.

U. S. v. Glidden Co. (DC Ohio 1934),
8 F. Supp. 177.

In U. S. v. Merrill, et al., (CCA 2d Cir.), 73 F. (2d) 49, the defendants had been charged with smuggling liquor and conspiracy to smuggle. While a majority of the appellate court held that the provisions of the Tariff Act in question were not affected by the repeal of the Eighteenth Amendment and the judgment of conviction was sustained for the reason "that the indictment was not based upon the National Prohibition Act, but upon the Tariff Act of 1930, Sec. 593", the remarks of Judge Hand in his dissenting opinion as to the effect of the repeal upon all legislation intended to implement the Eighteenth Amendment. is pertinent here. We quote the following:

"When the Eighteenth Amendment was repealed, all 'implementing' legislation fell with it, whether it was in the National Prohibition Act or the Tariff Act or anywhere else."

U. S. v. Merrill, et al., 73 F. (2d) 49, at 52.

If the statute under consideration in this case be deemed to impose upon the bondsmen a penalty, as distinguished from a liability for the payment of "fines, costs and damages", then clearly it is purely "implementing" legislation, and necessarily fell with the repeal of the Eighteenth Amendment.

IV.

DOES A JUDGMENT AGAINST A THIRD PARTY (ONE EVERETT KNAUS IN THIS CASE) PROVE A BREACH OF THE CONDITIONS OF THE BOND AS AGAINST THE DEFENDANTS HEREIN?

(Specifications 3, 4 and 5)

The admissibility of evidence in an action at law is to be determined by the State decisions and practice.

Wilcox v. Hunt, 13 Peters 378,
10 L. Ed. 209;

Bucher v. Cheshire Railroad Co., 125 US 555,
8 S. Ct. 974, 31 L. Ed. 795;

Fisher Flouring Mills Co. v. U. S.
(CCA 9th Cir.), 17 F. (2d) 232.

In the case last cited, this Court said:

"Under the conformity statute, a federal court sitting in that state will follow the decisions of the highest court of the state in matters of evidence in common law actions unless Congress has provided otherwise" (citing cases)

Fisher Flouring Mills Co. v. U. S.,
17 F. (2d) 232, at 235;

See also cases collected in Note 84 to Sec.
725, Title 28 USCA.

Knaus was not a party to the bond, nor was he an agent, employee or tenant of any of the parties to the bond. The Montana statute provides:

"The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another."

Sec. 10509 RC Montana 1921.

In this case, there is no "particular relation" between Everett Knaus and the defendants in this suit. The rights or liabilities of the defendants in this action could not, therefore, be "prejudiced" by the act of said Knaus under the terms of the statute above quoted, and the judgment between the United States and Knaus is binding only upon the parties to the action, their representatives and successors in interest.

Secs. 10558, 10559 RC Montana 1921.

The rule applicable to the facts of this case is stated in a general work as follows:

> "Ordinarily a judgment of conviction or acquittal of a party on a criminal charge cannot be used as evidence in a civil action of the facts or matters upon which such judgment is based."

8 Encyc. of Ev. 850-851;

Marceau v. Travellers' Ins. Co., 101 Cal. 338, 35 Pac. 856;

Burke v. Wells Fargo & Co., 34 Cal. 62.

The principle was stated by the Supreme Court of California in Marceau v. Travellers' Insurance Co., supra, and its previous decision in Burke v. Wells Fargo & Co. analyzed. Therein the plaintiff brought suit upon a life insurance policy upon the life of one John D. Fisk, which contained a clause declaring it invalid if death resulted from "intentional injuries inflicted by the insured or any other person". Fisk had been shot to death by one Stillman and Stillman had been tried and convicted of murder and was sentenced to life imprisonment. Upon the trial of the civil action, the insurance company offered in evidence the judgment roll in the case of People v. Stillman. The evidence was excluded and on appeal, the

Supreme Court held the judgment roll properly excluded. The Court said:

> "She was not a party to the action, in no manner interested in the result of the litigation, and her pecuniary interests could in no way be affected by the result of that trial. A striking illustration of this principle is found in Burke v. Wells, Fargo & Co., 34 Cal. 62. One Driscoll was convicted of robbing Wells, Fargo & Co. The parties arresting Driscoll brought an action against that company to recover a reward offered for the arrest and conviction of the thief. It was held by the court that, as against the defendant, Wells, Fargo & Co., that company being a stranger to the action, the record of conviction was no evidence that Driscoll was the thief, and that plaintiff should be required to establish that fact by independent evidence de novo."
>
> Marceau v. Travellers' Ins. Co., 101 Cal. 338, 35 Pac. 756 at 858.

The same rule has been adopted in Montana.

Doyle v. Gore, 15 Mont. 212, 38 Pac. 939.

The following is the headnote taken from Doyle v. Gore, supra:

> "A judgment of conviction for assault before a justice is not admissible, in an action for damages by the person assaulted against defendant, to show the fact of assault."
>
> Doyle v. Gore, 15 Mont. 212, 38 Pac. 939.

In the case of Rodini v. Lytle et al, 17 Mont. 448, 52 LRA 165, 43 Pac. 501, the Supreme Court of Montana held that a judgment against a constable was not even prima facie evidence against the sureties on his bond conditioned for the faithful performance of the duties of his office. In support of its conclusion, the court, speaking through Mr. Justice DeWitt, said:

"It seems that to allow such practice would be an invasion of the principle that every man is entitled to his day in court. Another principle is that, when a defendant is sought to be charged with a liability, there is not a presumption of his liability to commence with. If we hold that a judgment against the principal is conclusive or prima facie evidence against the sureties, the sureties are obliged to start into the action with a presumption of liability against them. The ordinary rule of law is that the plaintiff must prove his case by evidence; but, if a judgment against the principal is evidence against the sureties, the affirmative of the case is thrown upon the defendants. They must take the burden of proof. Instead of the plaintiff proving his case, the defendants are placed in a position of being obliged to prove their non-liability. * * * * * We cannot countenance such practice.

We believe by far the best of the three rules above noticed is that which denies to the judgment against the principal any effect as against the sureties. We think the sureties should not be compelled to face a judgment, with all its presumptions, and one which was rendered in an action to which the sureties were not parties, and of which they had no notice whatever, and to defend which they had no opportunity."

Rodini v. Lytle et al., 17 Mont. 448, at 453-454, 52 LRA 165, 43 Pac. 501, at 503.

If the judgment against the principal upon the bond is not admissible in evidence in an action against the sureties upon the bond, then for much stronger reason a judgment against a total stranger to the bond ought not to be admissible against either principal or sureties upon the bond.

Appellants respectfully submit that the trial court erred in admitting in evidence against appellants herein the Judgment Roll in the case of United States v.

Knaus, and that there is no competent evidence in this case to sustain a judgment for appellee herein, and that the Court erred in denying appellants' motions for non-suit.

V.

CAN THE COURT, UPON A VERDICT FOR RECOVERY OF $1,000.00, WITHOUT INTEREST, enter a judgment for $1,000.00 *and INTEREST IN THE ADDITIONAL SUM OF $209.97 MORE?*

[Specification (7)]

The verdict rendered herein was for $1,000.00 *without* interest (R. 23). The judgment entered by the Clerk adds to the verdict of the jury interest in the sum of $209.97 (R. 25). The Clerk had no authority to enter judgment except "in conformity to the verdict". Section 9403 RC Montana 1921, provides:

> "When trial by jury has been had, judgment must be entered by the clerk, *in conformity to the verdict*, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."
>
> Sec. 9403 RC Montana 1921.

The general rule in the absence of statute is to the same effect and it is held that where the judgment exceeds the verdict by adding thereto interest from a date prior to the verdict, it is erroneous and should be reversed.

> "If plaintiff is entitled to interest on his claim or demand it must be found by the jury and included in their verdict. If the jury do not allow interest in their verdict, the court cannot allow it,

and it is error to give judgment for interest in addition to the amount of the verdict."

33 CJ 1177, Note 1, citing:

American Natl. Bank v. National Wall Paper Co., 77 F. 85, 23 CCA 33;

McNutt v. Los Angeles, 187 Cal. 245, 201 Pac. 592;

Butte Electric Ry. Co. v. Matthews, 34 Mont. 487, 87 Pac. 460.

The rule is stated in a general work as follows:

"There is no principle of law more firmly established than that the judgment must follow and conform to the verdict or findings."

11 Encyc. of Pl. & Pr. 905.

"A judgment must be rendered for the amount indicated by the verdict. Therefore, where the judgment is entered for an amount greater than the verdict, it is erroneous and will be reversed."

11 Encyc. of Pl. & Pr., 910.

Appellants respectfully submit that the judgment is erroneous in that it exceeds the verdict by the sum of $209.97, and that it should be reversed.

VI.

HAD THE COURT JURISDICTION TO DIRECT A VERDICT AND ENTER A JUDGMENT AGAINST THE APPELLANT, HARRY THOMPSON, IN VIEW OF THE FACT THAT HE HAD NOT BEEN SERVED WITH PROCESS NOR APPEARED IN THE ACTION?

[Specifications (8) and (9)].

The record shows that the defendant, Harry Thompson, was not served with summons in this action (R. 7), nor did he file any pleading or appearance in the action (R. 7-17). The Court was, therefore,

without jurisdiction to direct a verdict against him or to cause a judgment to be entered against him, and the appellant, Thompson, has made a separate assignment of error thereon (R. 72). It appears to the appellants that the trial court's lack of jurisdiction is so obvious that argument is unnecessary.

Appellants respectfully submit that the judgment herein should be reversed and the cause remanded to the trial court with directions to dismiss the action.

Respectfully submitted.

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SUBJECT INDEX

TABLE OF CASES

TEXT BOOKS AND STATUTES